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In The

Supreme Court of the United States

October Term, 1988

C. T. CARDEN, LEONARD L. LIMES,
AND MAGEE DRILLING COMPANY,

Petitioners,

versus

ARKOMA ASSOCIATES,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

ARGUMENT

The Jurisdictional Issue:

Respondent's discriminating selection of jurisprudence does not begin to refute the signal argument which

is dispositive of the issue before this Court, which may be paraphrased as follows:

In determining diversity jurisdiction, this Court has never disregarded the citizenship of each and every member of an association when the association did not have statutorily recognized status as a juridical person.

Both a corporation and a *sociedad en comandita* are juridical persons. The evolution of this Court's treatment of the former category, which occupies such a prominent role in Respondent's brief, does not alter this verity. In order to exclude the citizenship of any member, this Court, as early as *Marshall v. Baltimore & Ohio R. R. Co.*, 57 U. S. 314, 14 L. Ed. 953 (S. Ct.1854), recognized as decisive the presence of a "juridical person." *id.* at page 328.

Respondent argues as though this Court will not realize that the association which was the focus of *People of Puerto Rico v. Russell & Co.*, 288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903 (S. Ct. 1933) was a "juridical person" under the civilian laws of Puerto Rico, an entity separate and apart from its constituent members, capable of owning property, itself taxed as any other citizen; a distinction no more likely to be overlooked here than it was in *United Steel Workers of America v. Bouligny, Inc.*, 382 U. S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (S. Ct. 1965). There, this Court noted:

> The problem which it (*Puerto Rico*, supra) presented was that of fitting an exotic creation of the civil law, the *sociedad en comandita*, into a federal scheme which knew it not . . . But this Court held that the *sociedad* itself, not its members, was the party, doing so on a basis which is no help to petitioner. It did so because, as Justice

> Stone stated for the Court, in '[t]he tradition of the civil law, as expressed in the Code of Puerto Rico, the *sociedad* is consistently regarded as a juridical person.' 228 U. S., at 480-481, 53 S. Ct., at 448-449.

(Parenthetical comment added). As clear as the *sociedad* was a juridical person, that is how clear it is that Respondent is not.

Respondent was formed under the laws of the State of Arizona. The issue then is whether Arizona partnerships (or even limited partnerships) are juridical persons. Both the Arizona statutes and the jurisprudence reflect that they are not.

The controlling statute defining the nature of a partnership is *Arizona Revised Statutes 29-206* which provides:

> A. A partnership is an association of two or more persons to carry on as co-owners a business for profit.
>
> B. . . .but this statute shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith.

In that the *Arizona Limited Partnership Act, Arizona Revised Statutes 29-301, et seq.*, does not contain any provisions similar to those of the Puerto Rican *Civil* and *Commercial Codes* providing juridical personality to a limited partnership, there is no basis in Arizona law to treat Arkoma as a juridical person. Therefore, Arkoma is an association whose citizenship is determined by that of all of its members.

An example of the civil law tradition in regard to partnerships, mentioned by this Court in *Puerto Rico*, is *Article 2801* of the *Louisiana Civil Code* which provides:

> A partnership is a juridical person, distinct from its partners, created by a contract between two or more persons . . .

Such a provision as *Article 2801* is absent from the law of Arizona. The entity status of a partnership is, therefore, an unprovided for case. *Section 29-363*[1] of the *Arizona Limited Partnership Act* (1982) provides:

> In any case not provided for in this act the provisions of the Uniform Partnership Act govern.

The *Arizona Partnership Act* by the same omission does not provide that a partnership is a juridical person. Therefore, one must look to its provisions regarding unprovided for cases which provisions are contained in *Section 29-205* which states:

> In any case not provided for in this chapter the rules of law and equity, including the law merchant shall govern.

Section 29-205 was interpreted in *Dolph v. Cortez*, 8 Ariz. App. 429, 446 P. 2d 939 (Ariz. App. 1968) in which the Court held:

> A. R. S. 29-205, 10 A.R.S., provides that, in situations not covered by the Uniform Partnership Act, the common law shall apply. The Act

[1] Although *Section 29-363* of the *Arizona Limited Partnership Act* was enacted in 1982, and Arkoma was allegedly formed August 31, 1981, *Section 29-364* provides that *29-363* shall effect existing partnerships.

> nowhere establishes a partnership as a legal entity such as is capable of suing or being sued in its own right. . . .

Respondent treats *Navarro Savings Association v. Lee, et al.*, 466 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980), as if it did not say:

> Although corporations suing in diversity long have been "deemed" citizens, see n. 7, supra, *unincorporated associations remain mere collections of individuals. When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 20 S. Ct. 690, 693, 44 L. Ed. 842 (limited partnership association) . . .

(Emphasis added); and as if it did not say:

> The Court has never analogized express trusts to business entities for purposes of diversity jurisdiction . . .

Navarro, supra, certainly does not stand for any proposition advanced by Respondent. It does not liken limited partnerships to business trusts. It does the opposite. It does not disregard the presence of a juridical person as a *sine qua non* of disregarding the citizenship of members. It insists upon it.

Respondent's arguments deal, instead, with the antiquity of *Great Southern Fire Proof Hotel v. Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 824 (S. Ct. 1900) ignoring the specific reaffirmation of that decision nine years ago in *Navarro*, supra; and with the change in treatment of corporations from the dawn of the nineteenth century until now; while ignoring two important distinctions: 1)

Respondent is not a corporation (or a juridical person of any kind); and 2) even now, corporate citizenship is not tied to "a class of members" (*Mesa*, infra) as Respondent contends for, but to the state of incorporation and principal place of business *of the corporation*, rather than its members. *28 U. S. C. 1332 (c).*

Nor does Respondent answer Petitioner's argument that the diversity rule suggested in *Mesa Operating Limited Partnership vs. Louisiana Intrastate Gas Corporation*, 797 F. 2d 238 (5th Cir. 1986) (identifying clearly a class of members as the real party to a controversy) and contended for here by Respondent, is unworkable. Petitioners argued that such a rule could not possibly take account of limited partners who promote themselves outside of partnership records to the status of general partners by dint of their involvement in the affairs of the partnership. An essential distinction between limited partnerships and corporations, and one which is paramount in reflecting the extent to which the *Mesa* solution is unworkable, is that no corporate shareholder (or officer for that matter), can lose his shareholder status, and with it, limited liability, etc., by becoming involved in the administration of corporate affairs. Such is not the case with limited partners. No repository exists to which reference may be had by a prospective litigant to determine the members of that "clearly defined class" of people in charge which Respondent contends bear the name, general partners.

Nor do the Respondent's general partners "have exclusive and complete management and control of the operations of the partnership and have the power to do

anything necessary to further the purposes of the partnership" as stated at page 5 of Respondent's brief. To the contrary, the partnership articles reflect significant restrictions on the activities of the general partners with correspondent power in the so called limited partners (See Arkoma articles of partnership sections 6.2 and 6.3 [page 82 et seq., Joint Appendix]).

Respondent devotes significant attention to jurisdictional treatment of interpleader actions, which this case is not; to matters of ancillary jurisdiction, with which this case is not concerned; and to class actions, to which this case is foreign. Respondent discusses mammoth publicly held limited partnerships, to which category Respondent can never be equated even with the most grandiose delusions. Before this Court is a group of individuals purportedly gathering together under the auspices of the *Arizona Limited Partnership Act*[2] to turn a profit on what was left of drilling rigs they had purchased.

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[2] The District Court held that Arkoma had substantially complied with *Section 29-302* (1973), the Arizona statute in effect when Arkoma was allegedly formed, which provided in pertinent part:

> A. Two or more persons desiring to form a limited partnership shall:
>
> 1. Sign and acknowledge a certificate, which shall state: . . .
>
> (d) The name and place of residence of each member; general and limited partners being respectively designated . . .

(Continued on following page)

Respondent descries a trend toward the expansion of diversity jurisdiction, to which Petitioners respond that if there is a trend, it is to narrow diversity jurisdiction rather than expand it. The statute under consideration is not the interpleader statute, *28 U. S. C. 1335*, or the class action rule, *Rule 23* of the *Federal Rules of Civil Procedure*, which Respondent discusses at length. It is instead *28 U. S. C. 1332* under which the required amount in controversy has not declined in recent years, it has quintupled.

(Continued from previous page)

(f) The amount of cash and a description of and the agreed value of the other property contributed by each limited partner . . .

(i) The share of the profits or other compensation by way of income which each limited partner shall receive by reason of his contribution.

2. File for record the certificate in the office of the county recorder of the county in which the principal place of business is situated.

Reference to Arkoma's articles of partnership (Transcript, Exhibit D-5, Joint Appendix page 70) discloses failure to comply with *Section 29-302* in the following respects:

1. The limited partners did not sign the articles;

2. The names and places of residence of the limited partners do not appear in the articles as of May 23, 1985, the date this suit was filed;

3. The amount of cash or other property contributed by the limited partners does not appear;

4. Nor is the share of profits due each limited partner stated.

Such deficient articles do not constitute substantial compliance with *Section 29-302*.

Under its recent revisions, diverse citizens may not be chosen as estate representatives so as to invoke diversity jurisdiction, as they are now deemed to have the citizenship of those whom they represent, and, additionally the *Judicial Conference* has recommended complete abolition of diversity jurisdiction.[3]

The Intervention of Magee Drilling Company:

Under that section of its brief entitled, *Relief Requested*, Respondent asks this Court to sustain the dismissal of Magee's counterclaim asserting that Respondent is guilty of violations of the *Deceptive Trade Practices-Consumer Protection Act* (hereafter "DTPA") of the state of Texas. In the event that this Court dismisses this case for lack of diversity jurisdiction, the relief requested by Respondent would not be appropriate.

In *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord,*

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[3] The 1988 amendment to *28 U. S. C. 1332* reverses the holding of *Mecom v. Fitzsimmons Drilling Co.*, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (S. Ct. 1931), making it impossible to create diversity jurisdiction through the process of appointing an estate representative with appropriate citizenship, and obviates the problem of resolving the conflict in the jurisprudence recognized by the dissents in *Wilsey v. Eddingfield*, 475 U. S. 1130, 106 S. Ct. 1660, 90 L. Ed. 2d 202 (S. Ct. 1986).

Nor in its remarks concerning a perceived trend in the development of diversity jurisdiction, does Respondent mention the repeated recommendation of the *Judicial Conference* that diversity jurisdiction be abolished. See *Reports of the Proceedings of the Judicial Conference of the United States*, September 1987, page 72; September 1988, page 22.

et al., 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893 (S. Ct. 1914) this Court held that:

> These rights to intervene and file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit. No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be, – an appearance in the original suit, already brought, and in our view must abide the fate of that suit.

If the District Court was without jurisdiction initially, there was no action in existence in which Plaintiff could have intervened. It follows as night does day that, absent the jurisdiction of the court in the principal action, Magee's intervention therein was without effect.

In *Harris v. Amoco Production Co.*, 768 F. 2d 669 (5th Cir. 1985) which was a suit involving an equal employment opportunity claim filed by employees of the defendant in which the Equal Employment Opportunity Commission intervened, the Court stated:

> But these participatory rights remain subject to the intervenor's threshold dependency on the original parties' claims, for it is equally well-settled that '[a]n existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already existing suit.'

An existing suit within the court's jurisdiction is therefore a prerequisite to a viable intervention. This is not present in this case.

CONCLUSION

Arkoma Associates is a purported Arizona limited partnership. Therefore, its citizenship is determined by that of each of its members, one of whom is a citizen of Louisiana. In that Petitioners, Carden and Limes, are Louisiana citizens as well, diversity jurisdiction does not exist.

The Court should dismiss all claims in this suit for lack of diversity jurisdiction.

Respectfully submitted,

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